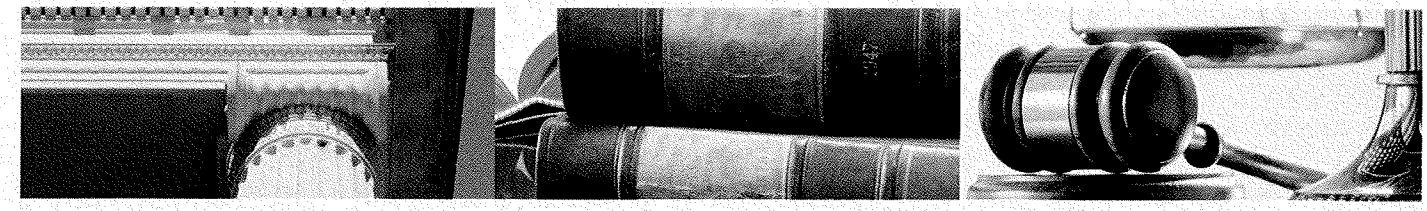


TASB School Law Update

A PUBLICATION OF TEXAS ASSOCIATION OF SCHOOL BOARDS LEGAL SERVICES

Why Is This Case Significant?

In this case about a city council, the court held that if a governmental entity takes an action that violates the OMA, subsequent ratification of the action may not necessarily cure the violation. Subsequent ratification does not render the issue moot as a court could still declare that the governmental entity violated the OMA; compel it to publicly disclose all transcripts, minutes, recordings and other evidence of closed meetings; require it to comply with the OMA in the future; and order it to pay attorney fees.

Case of the Month

City's repeal and subsequent ratification of action alleged to violate OMA did not make allegations of violations moot.

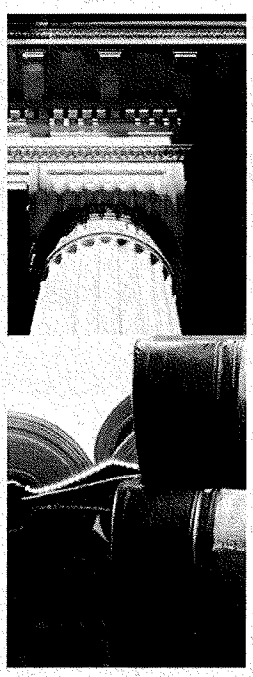
The City of Farmers Branch adopted a city ordinance mandating that owners and property managers of apartment complexes require proof of citizenship or eligible immigration status for prospective tenants. Guillermo Ramos, a Farmers Branch resident and real estate agent, alleged that the city council deliberated on and agreed upon the controversial ordinance in closed meetings in violation of the Texas Open Meetings Act (OMA) and filed suit against the City of Farmers Branch and all city council members in their official capacities.

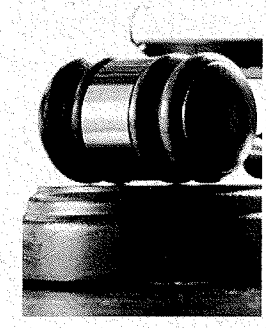
Ramos alleged that a quorum of the city council drafted, deliberated, debated, and agreed upon provisions of the ordinance in closed sessions in an effort to circumvent the requirements of the OMA. Ramos claimed that during the closed deliberations the council discussed the importance of a unanimous vote in support of the ordinance and negotiated, modified and revised the ordinance in order to secure all the votes of council members. In fact, the mayor admitted that in closed sessions and through serial secret conversations, the council members discussed how they would vote on the ordinance. Consequently, Ramos alleged, when the city council voted publicly in open session, the vote was merely a rubberstamp of an agreement reached in secret. This was evidenced

In This Issue

TASB Legal Services

Mark Tilley, Editor
November 2007
Vol. 21, No. 9





TxDOT has published a form for reporting required school bus evacuation training. www.txdps.state.tx.us/ftp/forms/sb-3.pdf.

by the fact that no debate occurred in open session and the floor was opened for public discussion only after the council voted in favor of the ordinance.

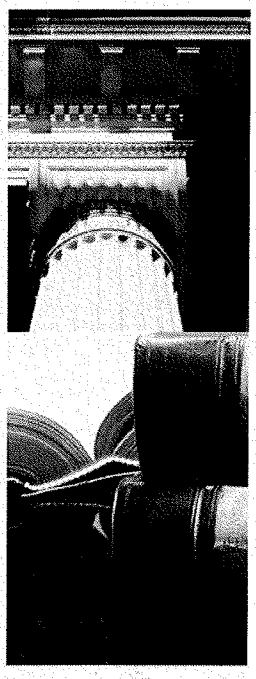
The city and the city council members filed a plea to the jurisdiction seeking dismissal of the lawsuit based on sovereign immunity. While the plea to the jurisdiction was pending, the city council adopted another ordinance that repealed the controversial ordinance, restated the substance of the ordinance, and called for a public vote. The trial court denied the plea to the jurisdiction, and the city and city council members brought an interlocutory appeal of the denial.

The city's first issue on appeal was that Ramos' pleadings failed to allege a violation of the OMA because the closed sessions at issue were conducted properly. The city claimed to have relied upon the attorney consultation exception in order to meet in closed session to discuss the ordinance as there had apparently been some threat of litigation at an earlier council meeting. The court questioned whether the city had shown that the executive session was proper, but even assuming that the attorney consultation exception applied, the court found that Ramos' allegations were sufficient to state a claim for a violation of the OMA.

In its second issue, the city argued that Ramos' claims were moot because the city council had repealed the ordinance. An issue is moot when one seeks a judgment (1) on a controversy that does not exist, or (2) that if rendered would have no practical legal effect on the controversy. Ramos contended that repeal of the ordinance did not render his claims moot because the question remained whether the city violated the OMA and, if they did, what relief should be granted. Repeal of the ordinance, Ramos argued, may mean the court did not need to void the ordinance, but did not remedy the breach of the public's right to know how and why the city council reached its decision. Ramos argued that the court could still compel the city to disclose all transcripts, minutes, recordings, and other evidence of the closed meetings and require the city to comply with the OMA in the future. The court concluded that the issue was not moot because merely repealing an action that violates the OMA so that it can be taken up in a later setting does not vindicate the public's rights that are protected by the OMA.

In its third issue, the city argued that any OMA violation can be ratified by and through subsequent action by a governmental entity. The court overruled the issue stating that this seemed to be an extension of the previous mootness argument that the court had rejected. Accordingly, the court dismissed the appeal and affirmed the trial court's denial of the plea to the jurisdiction. *City of Farmers Branch v. Ramos*, 235 S.W.3d 462 (Tex. App.—Dallas 2007).

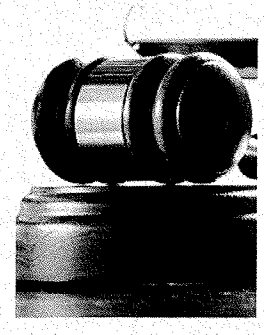
**** Editor's Note: Although the defendant in this case was a city, the court's interpretation of the OMA would likely apply to other governmental bodies including school districts.*



From the Feds

Safeguarding the E-Rate Program.

The Federal Communications Commission (FCC) issued final rules meant to safeguard the Universal Service Fund (USF) from waste, fraud, and abuse, including the USF program that benefits schools and libraries known as E-rate. The new measures, which are effective October 24, 2007, are intended to improve the management, administration, and oversight of the USF. The FCC adopted tougher rules requiring timely payments and assessing penalties or interest for late payments by contributors to USF. The FCC also decided not to adopt additional audit requirements for contributors and beneficiaries of the USF, but instead to closely watch data emerging from the more than 400 currently existing audits. The FCC decided to retain the requirement that schools retain records evidencing that the funding they received was proper for a minimum of five years. The FCC also clarified that beneficiaries must make available all documents and records that pertain to them, including those of contractors and consultants working on their behalf. 47 C.F.R. § 54 (2007).

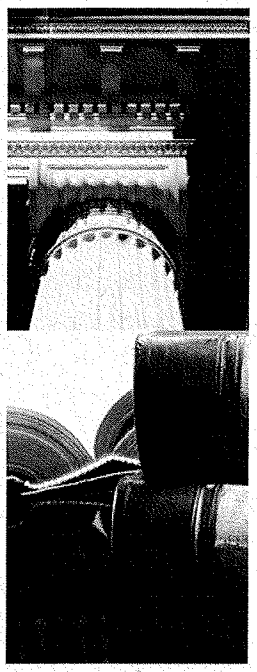


From the Bench

U.S. Supreme Court

IDEA requires tuition reimbursement for private school even when child has not previously attended public school.

The New York City Board of Education (Board) determined that Gilbert F. suffered from attention deficit hyperactivity disorder and other learning disabilities. The Board developed an IEP for Gilbert and recommended placement in public school. Tom F., Gilbert's father, believed the IEP was inappropriate and rejected placement in public school, choosing instead to enroll Gilbert in private school. Tom thereafter brought an administrative complaint against the Board, requesting an impartial hearing and seeking tuition reimbursement for the 1999-2000 school year in the amount of $21,819. The impartial hearing officer found that the Board failed to show that its recommended placement was appropriate and granted Tom's request for tuition reimbursement. The Board appealed, and a state review officer affirmed the hearing officer's decision. The Board appealed the state review officer's decision to the U.S. District Court, which reversed the decisions of the hearing officer and state review officer, holding that IDEA does not require a public school district to reimburse a parent for tuition if the child had never been enrolled in public school. Tom appealed to the Second Circuit Court of Appeals, which vacated the District Court's decision and remanded the case, holding that the IDEA was not meant to deny reimbursement to students even if a child has been unilaterally placed in private school by the parent and the child has not previously received special education or related services from a public school. According to the Court,

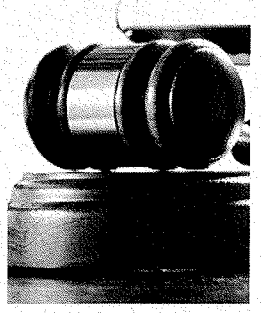


to rule otherwise would be to require parents to enroll children in inappropriate public school programs before they could be eligible for tuition reimbursement. The Board appealed to the U.S. Supreme Court. The Supreme Court, with Justice Kennedy recusing himself, split 4-4, thereby affirming the judgment of the Second Circuit. *Board of Educ. of City School Dist. of New York v. Tom F.* ex rel Gilbert F., 193 Fed. Appx. 26 (2d Cir. 2006), *aff'd*, 128 S. Ct. 1 (2007).

U.S. Supreme Court denies writ in bonfire case.

The U.S. Supreme Court denied a petition for writ of certiorari in the Texas A&M bonfire case. The Court's decision leaves intact the Fifth Circuit Court of Appeals' decision that Texas A&M University officials were immune from lawsuits filed by survivors and relatives of victims of the 1999 bonfire collapse, which killed 12 students and left 27 others injured. See TASB School Law Update, Vol. 21, No. 5 (May 2007). *Breen v. Texas A&M Univ.*, 485 F.3d 325 (5th Cir. 2007), *cert. denied*, 128 S. Ct. 377 (2007).

Fifth Circuit Court of Appeals



Student with ADHD was not a child with a disability under IDEA.

A.D., a student in Alvin ISD, received special education services for a speech impediment and ADHD through the third grade, at which point, the school district and A.D.'s mother agreed he no longer qualified for special education services. After his dismissal from special education, A.D. performed well throughout elementary school. Starting in the seventh grade and continuing throughout the eighth grade, A.D. continued to perform well academically, but exhibited behavioral problems that culminated in theft of property and robbery of a school-sponsored concession stand. While the disciplinary decision for A.D.'s theft was pending, A.D.'s mother complained that Alvin ISD failed to provide A.D. with a free appropriate public education (FAPE) as required by the Individuals with Disabilities in Education Act (IDEA). After a comprehensive evaluation of A.D., an ARD committee concluded that A.D. was not eligible for special education services. At a subsequent due process hearing to appeal the ARD committee's decision, the hearing officer concluded that A.D. was a child with a disability entitled to special education services and that Alvin ISD failed to provide him with FAPE. Alvin ISD appealed the hearing officer's decision to federal district court, which held in favor of the school district and overturned the decision of the hearing officer. A.D.'s mother appealed the district court's decision to the Fifth Circuit Court of Appeals. Upon review, the Fifth Circuit stated that in order to qualify for special education services, a student must (1) have a qualifying disability and (2) by reason thereof, need special education and related services. The court recognized that ADHD is a qualifying disability under IDEA, so the issue to be determined was whether A.D. needed special education and related services by reason of his ADHD. Alvin ISD argued that A.D. did not need special education services by reason of his ADHD for several reasons including, A.D.'s academic progress as shown by his passing grades

TEA has issued information with respect to the agency's position on home schooled students. www.tea.state.tx.us/taa/homesch110107.htm.

and success on the TAKS test, his social success in school, and the fact that his behavioral problems resulted from non-ADHD related events such as alcohol abuse and the tragic death of A.D.'s younger brother. The Fifth Circuit agreed with Alvin ISD holding that the district court properly considered evidence of A.D.'s academic, behavioral, and social progress in determining that he did not need special education services by reason of his ADHD and, therefore, was not a child with a disability under IDEA. Accordingly, the Fifth Circuit affirmed the district court's decision. *Alvin Indep. Sch. Dist. v. A.D. ex rel. Patricia F.*, 503 F.3d 378 (5th Cir. 2007).

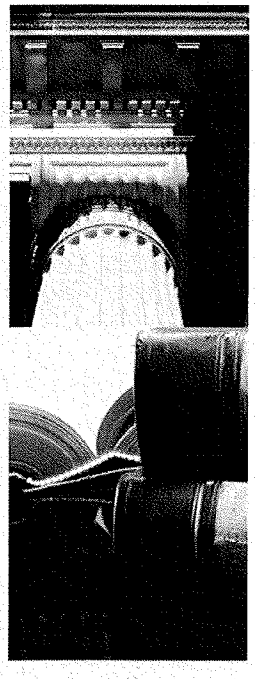
School cannot take adverse action against employee for educating child in private school without showing material and substantial effect on educational mission.

Karen Jo Barrow was employed as a teacher in Greenville ISD, and her children were enrolled in a private religious school. During the summer of 1998, Barrow applied for the vacant position of assistant principal. Greenville ISD did not hire Barrow for the position, allegedly, because her children attended private school and Barrow would not agree to move her children to public school. Barrow filed suit against her Superintendent, Dr. Herman Smith, alleging violations of her constitutional rights under 42 U.S.C. § 1983. In the third appeal arising from this lawsuit, Smith challenged the U.S. District Court's judgment entered after a jury verdict in favor of Barrow. Smith argued in part that the district court erroneously applied a heightened level of scrutiny in analyzing the constitutionality of the state action at issue. Specifically, Smith asserted that the district court applied a strict scrutiny standard when it should have used a rational basis test. The Fifth Circuit disagreed with Smith and affirmed the district court's judgment stating that the court correctly applied the law of the case, which was determined in the first appeal to the Fifth Circuit, that a state cannot take an adverse employment action against a public school employee for exercising the right to educate his or her child in private school unless it can prove that the employee's selection of private school materially and substantially affects the state's educational mission. *Barrow v. Greenville Indep. Sch. Dist.*, No. 06-10123, 2007 WL 3085028 (5th Cir. Oct. 23, 2007).

**** Editor's note: To follow the continuing saga of Barrow v. Greenville ISD, refer to the summaries in the March 2002, April/May 2002, July 2003, February 2005, October/November 2005 and March 2007 editions of the School Law Update.*

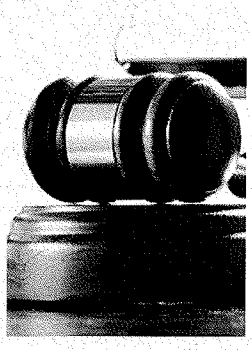
Adult student was subject to corporal punishment for failing to comply with school attendance policy.

Jessica Serafin was a student at the School of Excellence in Education, a public charter school in San Antonio, Texas, during the 2003-04 school year. Two weeks after Serafin's eighteenth birthday, she was caught leaving campus during the school day. In accordance with school procedures, and over her protest, Serafin's principal administered corporal punishment with a wooden paddle. Serafin's hand suffered minor, temporary injuries when she attempted to block the paddle. Serafin brought suit against the school and her principal alleging violations of her due



process and equal protection rights under 42 U.S.C. § 1983 as well as several independent state law claims. The district court declined to exercise jurisdiction over the state law claims and granted the defendants' motion for summary judgment dismissing all federal claims. Serafin appealed to the Fifth Circuit arguing in part that well-settled precedent on corporal punishment should not apply in her case because she was not a minor at the time punishment was administered. The court held that while state law did not compel Serafin to enroll in school after her eighteenth birthday, once she chose to do so, she was to be treated the same as all other students. Nothing in caselaw exempts non-minors from corporal punishment and Texas statutes pertaining to corporal punishment make no differentiation between adults and minors. Finding that Serafin could not prevail on her due process and equal protection claims, the Fifth Circuit affirmed the district court's grant of summary judgment. *Serafin v. School of Excellence in Educ.*, No. 06-50530, 2007 WL 3226296 (5th Cir. Oct. 30, 2007).

Federal District Courts



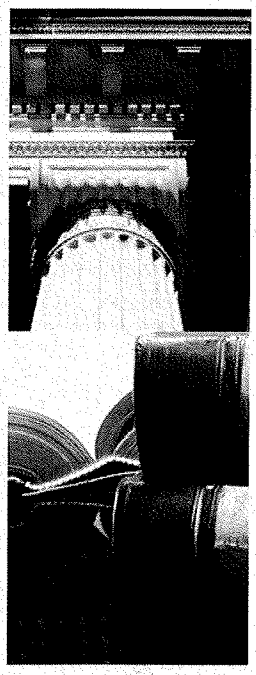
Federal court had no jurisdiction over ERISA claim arising from school district's long-term disability plan.

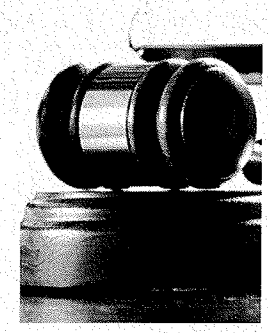
Kathleen Doty, a school teacher in Clear Creek ISD, brought an action in federal court to recover benefits under the school district's long-term disability plan. Doty invoked federal jurisdiction under the Employee Retirement Security Act (ERISA). Clear Creek ISD's counsel filed an answer admitting to the truth of the jurisdictional allegation. After entering a final judgment in favor of Clear Creek ISD, Doty discovered that the school district's plan was a governmental plan exempted from ERISA coverage and therefore, the court lacked subject matter jurisdiction over the action. Doty filed a post-judgment motion requesting the court to vacate the final judgment, and Clear Creek ISD argued that the judgment should stand. Because it lacked subject matter jurisdiction, the court vacated the final judgment and dismissed the case without prejudice. *Doty v. Sun Life Assur. Co. of Canada*, No. H-06-1869, 2007 WL 2903851 (S.D. Tex. Oct. 2, 2007).

The SBOE has approved procedures and issued guidelines for school districts to follow as they identify and provide services for students with dyslexia and related disorders. www.tea.state.tx.us/curriculum/elar/index.html.

Court did not have jurisdiction to hear fraud claim regarding school district's one-day work program.

Hudson ISD is among a small number of school districts in Texas that elected to participate in Social Security for its employees. Because it pays into both Social Security and the Teacher Retirement System (TRS), Hudson ISD was able to take advantage of a loophole in federal law that allowed retiring school employees to avoid what is referred to as the Government Pension Offset (GPO). The GPO is a mechanism by which one's spousal benefits under Social Security are reduced based on the amount of one's TRS benefits. The loophole essentially provided that the GPO would not apply to an employee who worked in a position paying into Social Security on the last day of employment prior to retirement. This allowed Texas teachers to work for as little as one day at a school district that pays into





Social Security and thereby avoid a reduction in Social Security benefits. Between June 2003 and June 2004, Hudson ISD hired approximately 1,645 workers under such a one-day work program. Joseph Fried filed a *qui tam* action against Hudson ISD claiming that the one-day program defrauded the U.S. government. *Qui tam* is a legal provision under the federal False Claims Act (FCA) that allows a private individual with knowledge of fraud committed against the federal government to bring suit on its behalf and receive a percentage of any award or settlement. Hudson ISD moved for summary judgment alleging that the court did not have jurisdiction over Fried's claim because he was not an original source of the information forming the basis of the claim—a requirement under the FCA. The court agreed with Hudson ISD and dismissed the case finding that Fried's *qui tam* action was based upon allegations that had been publicly disclosed by the school district and that Fried had "simply stumbled upon a seemingly lucrative nugget and attempted to cash in." *U.S. ex rel. Fried v. Hudson Indep. Sch. Dist.*, No. 9:05-CV-245, 2007 WL 3217528 (E.D. Tex. Oct. 26, 2007).

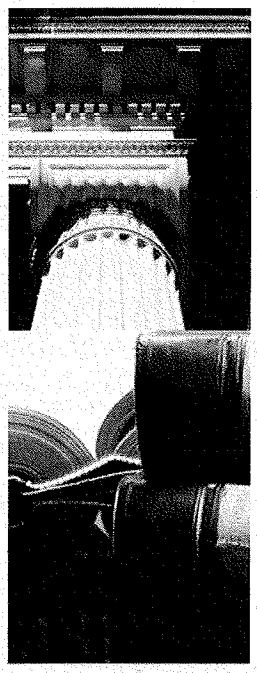
Federal court lacked jurisdiction over Public Information Act and assault claims.

Rebeca Perez, an employee of El Paso ISD, filed suit against the school district's superintendent, board of trustees, police chief, and legal counsel for reasons apparently arising from a contested employment evaluation. Perez, proceeding *pro se*, filed an Original Complaint that made employment discrimination and retaliation claims. Subsequently, she filed an Amended Complaint, which the court construed as alleging assault and which petitioned the court to order the release of a police report. The defendants filed a motion to dismiss for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted under Federal Rules of Civil Procedure 12 (b) (1) and (6). Despite the general absence of any factual allegations to support her claims, the court went to great lengths to construe Perez's pleadings in a manner most favorable to her, resolving any ambiguities or doubts regarding the sufficiency of her claims in favor of Perez. The court ultimately dismissed Perez's claims with prejudice finding that her Amended Complaint superseded the Original Complaint rendering it of no legal effect, but that even if the court could consider the Original Complaint, the pleadings failed to set forth facts in support of her claims that would entitle her to relief. Further, the court determined that it did not have subject matter jurisdiction over the Texas Public Information Act or over an assault claim. *Perez v. Araiza*, No. EP-07-CA-217-DB, 2007 WL 3125287 (W.D. Tex. Oct. 10, 2007).

In the A.G.'s Opinion

School districts must file a truancy complaint within ten school days of the student's tenth unexcused absence in a six-moth period.

The attorney general clarified the deadlines under which school districts must file a truancy complaint against a student under Texas Education Code sec. 25.0951(a). Considering its previous opinion No. GA-417 (2006) and recent



TEA has issued fingerprinting procedures for non-certified employees under Senate Bill 9. www.tea.state.tx.us/taa/sbec11 2007.htm.

legislative amendments to the statute, the attorney general concluded that a school district must file a complaint against a student with ten or more unexcused absences in a six-month period within ten school days of the student's tenth absence. A school district can file a new complaint listing the same absences as well as a subsequent tenth unexcused absence within ten school days of the tenth absence listed in the complaint. Other than dismissal of the complaint, no other penalties are imposed on a school district for failure to timely file a complaint. Op. Tex. Att'y Gen. No. GA-574 (2007).

****Editor's Note*: Texas Attorney General Opinions are indexed at www.oag.state.tx.us/opinopen/opindex.shtml.

The Commissioner Speaks

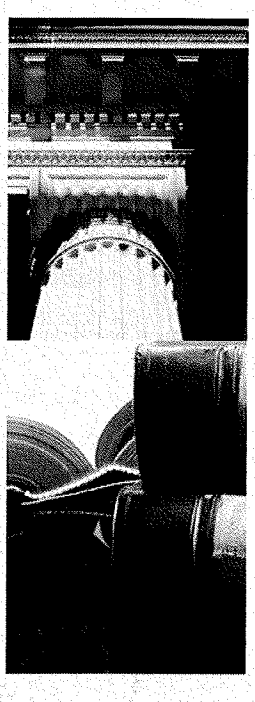
Commissioner upholds parent's philosophical objection to school uniforms based on the writings of John Dewey.

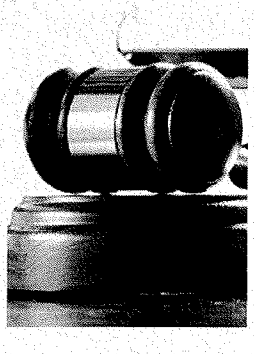
A parent requested an exemption from the district's uniform policy, based on the writings of John Dewey that "conformity is danger." The parent initially refused to complete a waiver request form, but complied when her objection was overruled. The board denied her request because her son had previously attended a parochial school where he had worn a uniform. In addition, her son wore a uniform when he participated in contact sports. On appeal, the commissioner upheld the parent's request for an exemption. The commissioner noted that the parent had changed her mind about uniforms because her son had a "bad experience" at the parochial school. Moreover, the parent stated that she supported uniforms for contacts sports to prevent chaos.

The commissioner also stated that in the future he would apply a new standard of analysis in uniform cases. He first stated that the previous burden-shifting analysis had led to confusion as to who had the burden to prove whether the parent's religious or philosophical objection is sincere. In the future, the parent will have the burden to state a bona fide objection at the local hearing and the board could consider evidence indicating that the objection was not sincere. On appeal, the parent will have the burden of proving that the board's decision is not supported by substantial evidence. *Child, b/n/f Parent v. United Indep. Sch. Dist.*, Tex. Comm'r of Educ. Decision No. 069-R8-0806 (Sept. 21, 2007).

Written Explanation Required for Changes to Hearing Examiner Recommendations.

A teacher at an alternative education center challenged her 30-day suspension without pay and placement on a one-year probation and growth plan. A board subcommittee had voted to propose termination of the teacher's term contract for falsification of records and neglect of duties. The teacher had prepared her own grade report form, thereby allowing her to complete student transcript evaluations





TEA has revised its letter to administrators relating to attendance, public school admission, enrollment records, and tuition. www.tea.state.tx.us/taa/legal110707.html.

without review by the school's counselor. Upon investigation of a student's grades, the district learned that the teacher had not monitored the student's on-line instruction patterns, which reflected possible abuses. In addition, the teacher sold food, both packaged and prepared, to students at the school.

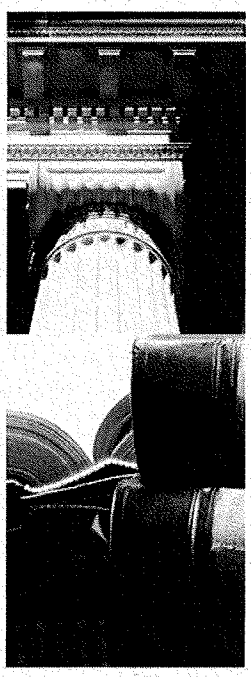
An independent hearing examiner found that the teacher was negligent in supervising and monitoring the student and in reviewing his daily usage. The hearing examiner also found that, by using her own grade report form, the teacher created an environment where she controlled the grading system checks and balances at the school. Finally, the hearing examiner expressed concern about the teacher's selling of foods to students because it created a misperception that she was making profits at the school. The hearing examiner recommended the teacher be suspended without pay for "one month." The subcommittee of the board considered the hearing examiner's recommendations and voted to suspend the teacher without pay for "30 days" and to place her on a one-year probation and growth plan.

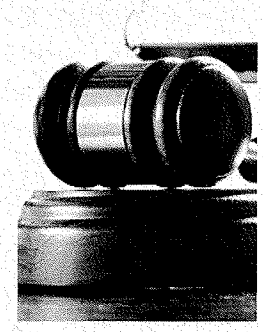
The teacher appealed the board subcommittee's decision, arguing the subcommittee changed the hearing examiner's recommendation without written explanation, as required by Texas Education Code section 21.259(d). The commissioner granted in part and denied in part. First, the commissioner concluded the subcommittee violated Section 21.259(d) because the subcommittee did not provide a written reason or legal basis for adding the one-year probation and growth plan. He therefore overturned this part of the subcommittee's decision. The commissioner stressed, however, that the decision should not be interpreted as prohibiting the district from subsequently taking action, outside the context of the appeal, to improve teacher performance. Second, the commissioner rejected the teacher's argument that the subcommittee modified the recommendation by changing her suspension from "one month" to "30 days." The commissioner concluded that 30 consecutive calendar days is one month, so the subcommittee's vote was substantially the same as the hearing examiner's recommendation. *Tillis v. Dallas Indep. Sch. Dist.*, Tex. Comm'r of Educ. Decision No. 087-R2-0807 (Oct. 15, 2007).

Legal Line

Q: Does having the Personnel Exception listed as an item on the board agenda with no other detail allow the board to discuss personnel issues in closed session?

A: Not necessarily. The general rule is that notice for a meeting must be sufficient to apprise the general public of the subjects to be considered during the meeting. And as public interest in an issue increases, so does the level of specificity required for the notice. Stating "Personnel" as an item with nothing more does not necessarily inform the public of what is to be





considered by the board, especially if the subject to be discussed is one of special interest to the public such as hiring or terminating a high-profile employee. To be safe, if "Personnel" is listed as an item on the board agenda, it should be followed by more specific agenda items.

Q: Can we deliberate about a board member under the Personnel Exception?

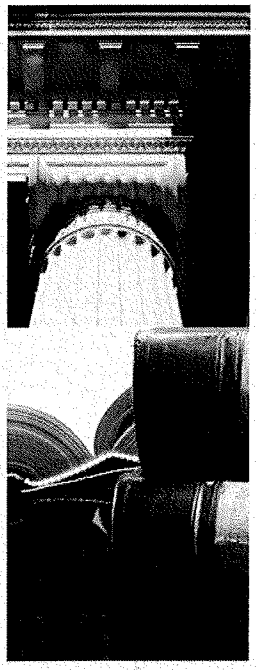
A. Yes. The Personnel Exception to the OMA does not require an open meeting to deliberate the appointment, employment, evaluation, reassignment, duties, discipline, or dismissal of a public officer or employee; or to hear a complaint or charge against an officer or employee. A board member is a public officer. The deliberation should occur in open session, however, if the board member who is the subject of the deliberation requests a public hearing.

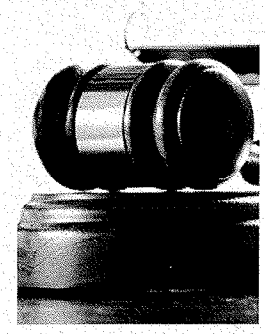
Q: What should a board member do if he believes the board is discussing an item in closed session that is not on the agenda?

A. If a board member knowingly participates in a discussion during closed session that is not on the agenda and therefore not permitted under the OMA, the board member commits a misdemeanor punishable by a fine of not less than $100 or more than $500, confinement in the county jail for not less than one month or more than six months, or both a fine and confinement. Consequently, if a board member knows that the board is discussing an item that is not on the agenda, he or she should request that the board president bring the discussion back in order. If the discussion continues, it is appropriate to cease participating and leave the closed session.

Q: What liability can a school district face if it conducts a closed session that violates the OMA?

A. In addition to the possibility of personal liability mentioned above, any interested person, including a member of the news media, can take legal action against the school district to stop, prevent, or reverse a violation or threatened violation of the OMA. The court could order that any record of the closed session be made public, and if the party substantially prevails in such an action, the district could be ordered to pay the party's costs of litigation and reasonable attorney fees. The court must consider whether the action was brought in good faith and whether the conduct of the governmental body had a reasonable basis in law. If one is in doubt about how to conduct a closed session, it is advisable to consult legal counsel because it is always a defense that the board acted in reasonable reliance on a written opinion of the school district's attorney.





Post Script

Upcoming Training

Upcoming Training

2008 Winter Legal Seminars

Not able to make it to one of our Fall Legal Seminars? Why not plan on attending a TASB Legal Seminar in February. Dates and topics have already been decided upon and are listed below:

Dates and Locations:

February 7, 2008 Lubbock
February 12, 2008 Tyler

Topics include:

- Screening for Sex Offenders and Other Criminal Background Checks
- Trustees and Technology
- Student Religious Expression
- The Board's Role in Personnel
- Legal Update from 2007

Visit legal.tasb.org and click Winter Legal Seminars in the TASB Legal Training box for more information.